SJA Bhd & Anor v HLB Nominees (Tempatan) Sdn Bhd (No 1)

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–1259 OF 2002
SU GEOK YIAM JC
7 OCTOBER 2002

Companies and Corporations *— Meetings — Extraordinary General Meeting — Notice of intention to convene — Whether notice in contravention of time limit prescribed in s 144(3) — Whether s 144(3) mandatory — Whether notice null and void — Whether an irregularity curable — Companies Act 1965 ss 144(3) & 355(3)*

Companies and Corporations *— Meetings — Requisitions — Proper construction of s 144(3) of the Companies Act 1965 — Whether the time for calculating the three months for convening the Extraordinary General Meeting runs from the date of the deposit of the requisition or from the expiry of 21 days of the date of the deposit of the requisition — Companies Act 1965 s 144(3)*

Words and Phrases *— 'that date' — Companies Act 1965 s 144(3)*

The first plaintiff was a public limited company and the second plaintiff, the corporate and managing director of the first plaintiff. The defendant was a nominee for a group of shareholders of the first plaintiff. The defendant deposited with the first plaintiff a requisition for an extraordinary general meeting ('EGM') pursuant to s 144(1) of the Companies Act 1965 ('the Act'). 21 days passed without the directors of the first plaintiff proceeding to take steps to convene the EGM as requisitioned. Upon the default by the directors of the first plaintiff to act upon the requisition under s 144(1) of the Act, the defendant proceeded to convene the EGM pursuant to s 144(3) of the Act. The issues for determination before the court were: (a) whether on a proper construction of s 144(3) of the Act the time for calculating the three months for convening the relevant EGM stipulated in s 144 of the Act ran from the date of the deposit of the relevant requisition or from the expiry of 21 days of the date of the deposit of the said requisition; and (b) whether on a proper construction of s 144(3) of the Act, the defendant's notice indicating the defendant's intention to hold an EGM of the first plaintiff was in contravention of the time limit prescribed by the aforesaid section and therefore null and void.

Held:

(1) When the legislature enacted the two concluding words of s 144(3) of the Act, ie 'that date', it must be taken to have intended the cumulative effect of the two words to mean something which is indicated, named and understood as 'the date of the deposit of the requisition'. These words are found in

A s 144(3) and (1) of the Act. If the legislature had intended to give a different meaning to the concluding word 'date' in s 144(3) of the Act, it would not have used the preceding word 'that' to describe or refer to the word 'date' (see p 586H–I).

(2) Under s 144(1) of the Act, it is the directors who convene the B EGM. It is only reasonable and logical that time should only run from the date the company receives the requisition deposited by the requisitionists. Whereas under s 144(3) of the Act, it is the requisitionists who convene the meeting and therefore, it is only reasonable and logical that time should run from the date they deposit the requisition, which date is a fact within their special C knowledge (see p 587B–C).

(3) Where the directors themselves convene the EGM, the EGM must be held within two months from the date of the receipt of the requisition. However, where the requisitionists or any of them representing more than one-half of the total voting rights of all of D them convenes the EGM, the EGM must be held within three months from the date of the deposit of the requisition. This means that when the requisitionists or any of them who qualifies to do so convenes the EGM they or he is given another month to do so in order to take into account the period of 21 days which is given to the directors to convene the EGM. It is only after the expiration E of the 21 days without the directors convening the EGM that the shareholders or members concerned can themselves proceed to convene the EGM (see p 588B–D).

(4) In view of the words 'shall not be held' in the concluding phrase of s 144(3) of the Act, ie 'but any meeting so convened shall not F be held after the expiration of three (3) months from that date' the negative provision is a mandatory one and not merely a directory one. Consequently, the court cannot allow the defendant's notice convening the meeting to remain operative since it was clearly outside the three month period provided and intended by the legislature when enacting s 144(3) of the Act (see p 590C–D).

G (5) Before the court can exercise the discretion conferred upon it by s 355(4) of the Act to enlarge the time for the holding of the EGM outside the three month period stipulated in s 144(3) of the Act, there must be a proper application before the court. The defendant cannot apply for enlargement of time simply by way of H an oral application (see p 591D).

(6) Although the court following the case of *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10 is empowered to make a validation order in respect of proceedings at company meetings provided no injustice is done to the company or to any member or creditors thereof, the court has no judicial discretion to validate a I notice convening the meeting. Section 355(3) of the Act is inapplicable because there is nothing at this stage of the proceedings for the court to validate since the EGM, being a

future event, has yet to be held at the time of the hearing of the application (see p 591E–G). A

[Bahasa Malaysia summary

Plaintif pertama merupakan sebuah syarikat berhad dan plaintif kedua adalah pengarah korporat dan urusan plaintif pertama. Defendan adalah calon untuk sekumpulan pemegang saham plaintif pertama. Defendan telah mendepositkan dengan plaintif pertama satu rekuisisi untuk mengatur satu mesyuarat agung luar biasa ('MALB') menurut s 144(1) Akta Syarikat 1965 ('Akta tersebut'). 21 hari telah berlalu dan pengarah-pengarah plaintif pertama masih tidak mengambil langkah untuk mengatur MALB seperti yang direkuisisi. Apabila pengarah-pengarah plaintif pertama ingkar untuk bertindak atas rekuisisi di bawah s 144(1) Akta tersebut, defendan terus mengatur MALB menurut s 144(3) Akta tersebut. Isu-isu untuk ditentukan di hadapan mahkamah adalah sama ada: (a) berdasarkan satu tafsiran yang wajar atas s 144(3) Akta tersebut masa mengira tiga bulan untuk mengadakan MALB yang relevan yang ditetapkan dalam s 144 Akta tersebut bermula daripada tarikh deposit rekuisisi yang relevan atau daripada tarikh luputnya tempoh 21 hari tarikh deposit rekuisisi tersebut; dan (b) berdasarkan satu tafsiran yang wajar s 144(3) Akta tersebut, notis defendan yang menunjukkan hasrat defendan untuk mengatur satu MALB plaintif pertama melanggar had masa yang ditetapkan oleh seksyen tersebut dan dengan itu adalah tak sah dan terbatal. B C D E

Diputuskan:

(1) Apabila badan perundangan menggubal dua perkataan penutup s 144(3) Akta tersebut, iaitu 'that date', ia mestilah dianggap berhasrat supaya kesan kumulatif dua perkataan itu bermaksud sesuatu yang ditanda, dinama dan difahami, sebagai 'the date of the deposit of the requisition'. Perkataan-perkataan ini dijumpai di dalam s 144(1) dan (3) Akta tersebut. Jikalau badan perundangan bertujuan memberi maksud yang berlainan kepada perkataan penutup 'date' dalam s 144(3) Akta tersebut, ia tidak mungkin menggunakan perkataan mendahului 'that' untuk menyifat atau merujuk kepada perkataan 'date' (lihat ms 586H–I). F G

(2) Di bawah s 144(1) Akta tersebut, pengarah-pengarah merupakan pihak yang mengadakan MALB. Adalah munasabah dan masuk akal bahawa masa seharusnya bermula daripada tarikh syarikat tersebut menerima rekuisisi yang didepositkan oleh pihak yang merekuisisi. Manakala di bawah s 144(3) Akta tersebut, pihak yang merekuisisi yang mengatur mesyuarat tersebut dan dengan itu, ia munasabah dan masuk akal bahawa masa harus bermula daripada tarikh mereka mendeposit rekuisisi, yang mana tarikh tersebut merupakan fakta dalam pengetahuan khas mereka (lihat ms 587B–C). H I

(3) Di mana pengarah sendiri mengatur MALB, MALB mesti diatur dalam tempoh dua bulan daripada tarikh penerimaan rekuisisi. Namun demikian, di mana pihak yang merekuisisi atau sesiapa daripada mereka yang mewakili lebih daripada separuh jumlah hak mengundi kesemua mereka mengatur MALB, MALB mesti diatur dalam tempoh tiga bulan daripada tarikh deposit rekuisisi. Ini bermakna bahawa apabila pihak yang merekuisisi atau sesiapa antara mereka layak berbuat demikian mengatur MALB, mereka atau beliau diberi masa satu lagi bulan untuk berbuat demikian supaya boleh mengambil kira jangkamasa 21 hari yang diberi kepada pengarah untuk mengatur MALB. Hanya selepas luputnya 21 hari tanpa pengarah mengatur MALB barulah pemegang saham atau ahli berkenaan boleh terus mengatur MALB (lihat ms 588B–D).

(4) Memandangkan perkataan-perkataan 'shall not be held' dalam ungkapan akhir s 144(3) Akta tersebut, iaitu 'but any meeting so convened shall not be held after the expiration of three (3) months from that date', peruntukan negatif adalah mandatori dan bukan sekadar mengarah. Akibatnya, mahkamah tidak boleh membenarkan notis defendan mengatur mesyuarat terus kekal oleh kerana ia jelas di luar tempoh tiga bulan yang diperuntukkan dan diniatkan oleh badan perundangan ketika menggubal s 144(3) Akta tersebut (lihat ms 590C–D).

(5) Sebelum mahkamah dapat menggunakan budi bicara yang dikurniakan atasnya oleh s 355(4) Akta tersebut untuk melanjutkan masa untuk perlangsungan MALB di luar tempoh tiga bulan yang ditetapkan dalam s 144(3) Akta tersebut, permohonan sewajarnya mestilah dibuat kepada mahkamah. Defendan tidak boleh memohon perlanjutan masa sekadar melalui permohonan secara lisan (lihat ms 591D).

(6) Walaupun mahkamah, mengikut kes *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10, diberikuasa membuat perintah pengesahan berkaitan prosiding di mesyuarat syarikat dengan syarat tiada ketidakadilan diakibatkan kepada syarikat atau mana-mana ahli atau pemiutangnya, mahkamah tidak mempunyai budi bicara kehakiman untuk mengesahkan suatu notis mengatur mesyuarat tersebut. Seksyen 355(3) Akta tersebut tidak boleh dipakai kerana tiada apa-apa di peringkat prosiding ini untuk disahkan oleh mahkamah memandangkan MALB yang merupakan peristiwa masa depan masih belum diadakan pada masa pembicaraan permohonan (lihat ms 591E–G).]

[*Editorial Note*: The plaintiffs have filed an appeal in the Court of Appeal vide Notice of Appeal No P–02–597–2002.]

Notes

For cases on extraordinary general meetings, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 328–332.

For cases on requisitions, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 354.

Cases referred to

Alexander v Kirkpatrick (1874) LR 2 Sc&Div 397 (refd)
Ariadne Australia Ltd, Re; Votraint No 255 Ltd v Capp & Ors (1990) 2 ACSR 791 (refd)
Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111 (refd)
Basset v Basset (1744) 3 Atk 203 (refd)
Bastin v Davies [1950] 2 KB 579 (refd)
Bath v British Transport Commission [1954] 2 All ER 542, [1954] 1 WLR 1013 (refd)
Bromley & Ors v Tryon & Ors [1952] AC 265 (refd)
Brutus v Cozens [1972] 2 All ER 1297 (refd)
Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord [1976] QB 44 (refd)
Dato' Hamzah Abdul Majid & Anor v Wembley Industries Holdings Bhd [1998] MLJU 443, [1998] 4 CLJ 471 (refd)
Gorham v Exeter (Bp), Ex p Exeter (Bp) (1850) 10 CB 102, 138 ER 41 (refd)
Henty v Wrey (1882) 21 Ch D 332 (refd)
Kimpton v The Steel Co of Wales Ltd [1960] 2 All ER 274 (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10 (not folld)
Newcastle Corpn v A-G (1845) 12 Cl & F 402 (refd)
R v Ritson (1869) LR 1 CCR 200 (refd)
See Nyuk Fung & Ors v PanGlobal Equities Bhd [1991] 1 MLJ 152 (refd)
Stephens v Cuckfield Rural District Council [1960] 2 QB 373, [1960] 2 All ER 716 (refd)
Strother v Hutchinson (1837) 4 Bing NC 83 (refd)
Warner's Settled Estates, Re, Warner to Steel (1881) 17 Ch D 711 (refd)
Willmott v London Road Car Co Ltd [1910] 2 Ch 525 (refd)

Legislation referred to

Companies Act 1965 ss 128(2), 144, (1), (2), (3), (4), (5), 160(3), 355, (3), (4)

Dato' Mahinder Singh Dulku (*Mahinder Singh Dulku & Co*) for the plaintiffs.

Loh Siew Cheang (*Cheang & Ariff*) for the defendant.

Su Geok Yiam JC: On 24 July 2002, the plaintiffs filed an application vide an originating summons (encl 2) supported by the affidavit of the second plaintiff affirmed on the same date (encl 1), together with a certificate of urgency (encl 3) seeking the determination by the court of the following questions:

(1) whether on a proper construction of s 144(3) of the Companies Act 1965 ('the Act') the time for calculating the three months for convening the relevant extraordinary general meeting ('the EGM') stipulated in the said section runs from the date of the deposit of the relevant requisition or from the expiry of 21 days of the date of the deposit of the said requisition;

(2) whether on a proper construction of s 144(3) of the Act, the defendant's solicitor's notice dated 9 July 2002 indicating the defendant's intention to hold an EGM of the first plaintiff on 7 August 2002 is in contravention of the time limit prescribed by the aforesaid section and is therefore null and void.

In the event that the court is of the opinion that the defendant's intention to hold the EGM of the first plaintiff on 7 August 2002 is out of time and in contravention of the time limit prescribed by s 144(3) of the Act, the plaintiffs prayed for the following reliefs:

(a) a declaration that the defendant's solicitors' notice dated 9 July 2002 notifying the board of directors of the first plaintiff and the shareholders of the first plaintiff that the defendant intends to hold an EGM of the first plaintiff on 7 July 2002 at Sri Mas 2 & 3, The City Bayview Hotel, 25-A, Farquhar Street, 10200 Penang is null and void and of no effect;

(b) in the meantime an interlocutory injunction restraining the defendant whether by itself or by its servants or agents or otherwise howsoever from holding the EGM of the first plaintiff on 7 July 2002 at Sri Mas 2 & 3, The City Bayview Hotel, 25-A, Farquhar Street, 10200 Penang until the final determination of the proceedings herein or until further order of the court;

(c) costs of and incidental to the proceedings be paid by the defendant to the plaintiff;

(d) an order for damages to be assessed by the senior assistant registrar of the court and when so assessed to be paid by the defendant to the plaintiffs; and

(e) further or other relief as the court deems fit and proper.

Facts and Background

The facts and background leading to the above application are as follows.

The first plaintiff is a public limited company. The second plaintiff is the corporate and also managing director of the first plaintiff. The defendant is a nominee for a group of shareholders of the first plaintiff.

On 22 April 2002, the defendant deposited with the first plaintiff a requisition for an EGM together with a special notice of intended resolutions to remove a number of named directors of the company including the second plaintiff and to appoint two named persons as independent and non-executive directors at the requisitioned EGM pursuant to s 144(1) of the Act. 21 days passed without the directors of the

first plaintiff proceeding to take steps to convene the EGM as requisitioned. Upon the default by the directors of the first plaintiff to act upon the requisition under s 144(1) of the Act, the defendant proceeded to convene the EGM pursuant to s 144(3) of the Act.

On 9 July 2002, the defendant issued a notice of an EGM to be held on 7 August 2002. On 24 July 2002, the plaintiff filed this application to restrain the defendant from holding the EGM on 7 August 2002 on the ground that the defendant is out of time to hold the meeting under s 144(3) of the Act.

On 29 July 2002, the defendant filed its affidavit in reply affirmed on 26 July 2002 by Leong Chin Soon, the Senior Manager Remedial Management Department of Hong Leong Bank Bhd ('HLB') the defendant's principal.

On the same date, ie 29 July 2002, the plaintiffs filed its affidavit-in-reply (encl 5) affirmed on the same date by the first plaintiff.

On 29 July 2002, the court heard submissions from both learned counsel.

The submissions of the plaintiffs

Dato' Mahinder Singh Dulku, the learned counsel for the plaintiffs, submits that the words 'from that date' refer to the date of the deposit of the requisition to convene the EGM and that the time of three months run from the date of the deposit of the requisition, ie, on 22 April 2002 and not from the expiry of the 21 days from the receipt by the company of the requisition, ie on 13 May 2002. In the absence of any case law on the question, he relies on the views expressed by a number of authors (including the learned counsel for the defendant) in their textbooks on company law.

First he refers to pp 438–439 of the book *Principles of Company Law in Malaysia* by Shanthy Rachagan, Janine Pascoe and Anil Joshi where it is stated as follows:

> A general meeting other than the statutory meeting and annual general meeting is called an extraordinary general meeting. Under the articles, directors usually have the power to convene such meetings ...
>
> Section 144 enables members to requisition for the convening of a general meeting in certain circumstances. Under s 144, directors are required to convene a general meeting on the requisition in writing of:
>
> - in the case of a company with a share capital — members holding not less than ten per cent of the capital carrying voting rights; and
> - in the case of a company without a share capital — members representing not less than ten per cent of the total voting rights.
>
> ...
>
> *Where the directors fail to convene a general meeting within 21 days following a requisition, the requisitioning members may themselves convene the meeting: s 144(3). A meeting convened by requisitioning members must be held no more than three months after the making of the requisition to the directors.* (Emphasis added.)

Secondly he refers to the book on *Company Law* by Walter CM Woon where it is stated as follows on pp 131 –132:

> 7.3 *Extraordinary General Meetings*
>
> Any general meeting other than the annual meeting is an extraordinary general meeting.
>
> The directors must convene a general meeting if required to do so by requisition, notwithstanding anything in the company's articles. A requisition is a written notice to the directors requiring that a meeting be called. This course is often preferred as the members seldom have the means or the inclination to call a meeting themselves. A meeting may be requisitioned by any member holding not less than 10% of such paid-up capital of the company as carries voting rights, or in the case of a company without a share capital, by members representing 10% of the total voting rights. The requisition must state the objects of the meeting and must be signed by the requisitions and deposited at the registered office of the company. The directors must convene a meeting to be held as soon as practicable within two months after the receipt of the requisition by the company. *If the directors do not convene a meeting within 21 days after receipt of the requisition, the requisitionists may convene the meeting themselves; in this case the meeting must be held within three months of the date of the deposit of the requisition.* Any reasonable expenses incurred by the requisitionists in calling the meeting are to be paid by the company, which may reimburse itself out of any sums due to the defaulting directors by way of fees or other remuneration. (Emphasis added.)

Thirdly, he refers to the book *Charlesworth & Morse Company Law* (16th Ed), where it is stated on pp 214–215 as follows:

> Extraordinary general meetings
>
> Any general meeting of a company, other than an annual general meeting, is an extraordinary general meeting.
>
> Further, by s 368 [equivalent of our s 144], despite anything in the articles, the directors are *bound* to convene an extraordinary general meeting on the requisition of the holders of not less than one-tenth of the paid-up capital of the company carrying the right of voting at general meetings or, if the company has no share capital, of members representing not less than one-tenth of the total voting rights. The requisition must state the objects of the meeting and be signed by the requisitionists. *If the directors do not, within 21 days of the deposit of the requisition at the registered office of the company, proceed to convene the meeting fixed for a date within 28 days of its being summoned, the requisitionists, or the holders of more than half their voting rights, may convene it themselves so long as it is held within three months after such deposit.* The reasonable expenses of the requisitionists in convening the meeting must be repaid by the company, which must retain them out of any remuneration of the directors in default. (Emphasis added.)

Fourthly, according to Dato' Mahinder, Mr Loh Siew Cheang, the learned counsel for the defendants, has in his book *Corporate Powers, Controls, Remedies and Decision Making*, agreed that the date from whence the three months is to run is the date of the deposit of the requisition and not the date of the expiration of the 21 days because the latter has stated as follows on p 484:

> The effects of s 144(1) is that directors must hold the extraordinary general meeting within two months calculated from the date of receipt of the requisition. *In reckoning the period of two months in s 144(1), the period of 21 days in sub-s (3) is to be included. This is borne out by the language of s 144(3), which seeks only to impose a time period within which directors are to act or proceed to convene the extraordinary general meeting, and is intended to provide that upon default by directors to convene the meeting as requisitioned within the period of 21 days, the requisitionists themselves or any one of them acquires the right to proceed to convene the meeting.* (Emphasis added.)

Dato' Mahinder Singh Dulku also submits that the Supreme Court case of *See Nyuk Fung & Ors v PanGlobal Equities Bhd* [1991] 1 MLJ 152 is applicable to the facts of the present case and that s 355(3) of the Act cannot be invoked because no breach has been particularized by the defendant and, consequently, there is nothing to rectify or validate.

He further submits that the court cannot assist the defendant by enlarging the time provided for the holding of the EGM under s 355(4) of the Act because the defendant has not made a formal application for enlargement of time and it was also held by Zakaria Yatim J (as he then was) in *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111, inter alia, that for the court to exercise its discretion whether or not to extend time there must be an affidavit giving reasons why time should be enlarged and the mistake of the defendant's solicitors is not a sufficient reason to grant an extension of time.

The plaintiffs deny the defendant's allegation contained in para 18 of the defendant's affidavit in reply (encl 4) that the plaintiff hindered the defendant's efforts to convene the EGM before 7 August 2002 by delaying in the supplying of the company's shareholders' list to the defendant.

The plaintiffs say that the list was not supplied because the defendant did not comply with s 160(3) of the Act by paying in advance a sum of RM3,000.

The plaintiffs also say that the defendant should start afresh by depositing a new requisition for the convening of another EGM.

However, Mr Loh Siew Cheang, the learned counsel for the defendant, submits differently. He says that there are three possible interpretations of the words 'from that date', to wit:

(1) from the date of the deposit of the requisition under s 144(1) of the Act; or

(2) from the date the statutory right accrued in favour of the requisitionists to convene the EGM under s 144(3) following the default by the directors to act upon a requisition within 21 days after the deposit of the requisition under s 144(1); or

(3) from the date that the requisitionists took steps to convene the meeting.

He argues that the second construction is the correct one for the purposes of s 144(3) of the Act. Construed in this way, it follows that the EGM

convened by the requisitionists must be held on a date which is not later than three months from the date that the statutory right to convene the EGM accrued in their favour, ie after the lapse of 21 days without the directors of the company acting on the requisition by the requisitionists pursuant to s 144(1).

The reason advanced by him to support such a construction is that since s 144(1) of the Act gives the directors of the company a time frame of 21 days to convene the EGM which must be held within two months from the date the requisition is deposited, it is plain that the requisitionists do not have a right to convene the EGM themselves until and unless the 21 days have expired without the directors acting upon their requisition.

He relies on the case of *Re Ariadne Australia Ltd; Votraint No 255 Ltd v Capp & Ors* (1990) 2 ACSR 791 and on the following submissions:

(1) if it was the intention of the legislature that the EGM convened by the requisitionists under s 144(3) is to be held within three months after the deposit or receipt of the requisition, then the legislature would have used the same language in s 144(1) and the ending words of s 144(3) would have read 'any meeting so convened shall not be held later than three months after the receipt by the company of the requisition';

(2) the words 'from that date' should be read together with the opening words of s 144(3) of the Act, namely, 'If the directors do not within 21 days after the date of the deposit of the requisition proceed to convene a meeting' because there is no right on the part of the requisitionists to 'convene' the EGM under s 144(3) of the Act until the lapse of 21 days;

(3) since the Act does not make a distinction between private companies with a few shareholders and a public company with a large number of shareholders having a right to attend and vote at meetings and since s 160(3) of the Act allows the registrar of companies a period of 21 days or such further period as the registrar considers reasonable to comply with a request of, inter alia, any member of a company to be furnished with a copy of the register relating to the names, addresses, numbers of shares held and amount paid on shares of the shareholders an unfair anomaly would arise if the words 'from that date' in s 144(3) of the Act are to be construed to refer to the date of the deposit of the requisition under s 144(1) of the Act because the directors will have a longer period to convene and hold the EGM under s 144(1) of the Act than the shareholders would have under s 144(3) of the Act in that:

(a) under s 144(5) of the Act the directors have 60 days (inclusive of the 21 days to decide whether to act upon the requisition or not);

(b) whereas under s 144(3) of the Act the requisitioning shareholders would have only 58 days (90 days minus the 21 days for the decision of the directors whether to convene the EGM under s 144(1) of the Act, and minus a further period of

21 days to obtain the register of members under s 160(3) of the Act).

Alternatively, Mr Loh Siew Cheang submits that in the event his primary submission is incorrect, there is power on the court to validate irregularities in proceedings under the Act pursuant to s 355 of the Act unless in the opinion of the court, substantial injustice has been caused or would result to the plaintiffs and which could not be remedied because there is nothing in s 144(1) or (3) of the Act to the effect that if an EGM is held outside the two and three month period, respectively, the EGM is an unlawful or void meeting. He also contends that the plaintiffs would not suffer any substantial injustice if the EGM is held some two weeks out of time and that the statutory purpose of s 144 of the Act is to advance or protect the interests of persons who are requisitionists and not to protect the personal interests of defaulting directors.

He further contends that since the delay in holding the EGM within the three month period has been caused by the plaintiffs' default which resulted in the company's shareholders' list being withheld from the defendant, the defendant should not be put to further expense in order to deposit a fresh requisition for another EGM.

He also disagreed with Dato' Mahinder Singh Dulku that he had touched on s 144(3) in his book.

Ruling of the court

The court ruled as follows in respect of question 1: that the proper construction of s 144(3) of the Act is that the time for calculating the three months for convening the relevant EGM stipulated in the section runs from the date of the deposit of the relevant requisition, and as follows in respect of question 2: that the defendant's solicitors' notice dated 9 July 2002 indicating the defendant's intention to hold an EGM of the first plaintiff on 7 August 2002 is in contravention of the time limit stipulated in the aforesaid section and is therefore null and void.

Consequently, the court granted order in terms of prayers (a), (b), (c) and (d) of the plaintiffs' application.

Reasons for the court's ruling

My reasons for doing so are as follows.

Section 144 of the Act contains provisions concerning the convening of an EGM of a company upon the requisition by the members of the company notwithstanding anything in the articles of a company. Pursuant to s 144(1) of the Act, the members must hold not less than $^{1}/_{10}$ of the paid-up capital of the company which carries the right of voting at general meetings or in a case of a company not having a share capital, the members must represent not less than $^{1}/_{10}$ of the total voting rights of all members having at that date a right to vote at general meetings. These members are referred to as the 'requisitionists' in s 144(2), (3) and (4) of the Act. Section

144(2) of the Act requires the requisition to state the objects of the EGM, to be signed by the requisitionists and to be deposited at the registered office of the company. It also provides that the requisition may consist of several documents in like form each signed by one or more requisitionists.

There are two ways in which the EGM is to be convened upon such a requisition being made.

First, pursuant to s 144(1) of the Act, the directors of the company shall forthwith proceed duly to convene the EGM upon the deposit of the requisition. The EGM shall be held as soon as practicable but shall not be held later than two months after the receipt by the company of the requisition.

Secondly, in the event that the directors of the company fail to convene the EGM within 21 days after the date of the deposit of the requisition, the requisitionists or any of them representing more than one-half of the total voting rights of all of them, may themselves, pursuant to s 144(3) of the Act convene the EGM in the same manner as nearly as possible as that in which meetings are to be convened by directors. It is expressly provided in the subsection that 'any meeting so convened shall not be held after the expiration of three months from that date'.

Section 144(4) of the Act provides that any reasonable expenses incurred by the requisitionists by reason of the failure of the directors to convene the EGM shall be paid to the requisitionists by the company. Any sum so paid by the company shall be reimbursed from any fees or other remuneration payable to the directors, who were in default, in respect of services rendered by the directors to the company.

Section 144(5) of the Act provides that in the case of special resolutions which are to be proposed at the EGM, the directors must give notice thereof as is required by the Act otherwise the EGM shall be deemed not to be duly convened.

The question which has arisen in this application is what is the proper construction which should be placed on the concluding words 'from that date' in s 144(3) of the Act.

In view of the importance of the construction of the concluding three words in s 144(3) and the difference in the wording of s 144(1) of the Act, it is essential to reproduce below both the subsections:

> Convening of extraordinary general meeting on requisition
>
> (1) *The directors of a company*, notwithstanding anything in its articles, *shall on the requisition of members holding at the date of the deposit of the requisition* not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that date a right to vote at general meeting, *forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition.*
>
> (2) ...

(3) *If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists, or any of them* representing more than one-half of the total voting rights all of them, *may themselves*, in the same manner as nearly as possible as that in which meetings are to be convened by directors *convene a meeting but any meeting so convened shall not be held after the expiration of three months from that date.*

(4) ...

(5) ... (Emphasis added.)

The principles of law relating to statutory interpretation are well established. The following principles are applicable in the instant case.

The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. This intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself (see *Halsbury's Law of England* (4th Ed) Vol 44, para 856).

If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning (see *Halsbury's Law of England* (4th Ed) Vol 44, para 857).

Where the words used are familiar and are in common and general use in the English language it is inappropriate to try to define them further by judicial interpretation and to lay down their meaning as a rule of construction and the only question for a court is whether the words are apt to cover or describe the circumstances in question in a particular case (see *Halsbury's Law of England* (4th Ed) Vol 44, para 865; *Bath v British Transport Commission* [1954] 2 All ER 542 at p 543, [1954] 1 WLR 1013; *Kimpton v The Steel Co of Wales Ltd* [1960] 2 All ER 274 at pp 276–277; *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373 at pp 382–383, [1960] 2 All ER 716 at pp 719–720; *Brutus v Cozens* [1972] 2 All ER 1297).

The words of a statute are to be taken in their ordinary sense (see *Halsbury's Law of England* (4th Ed) Vol 44, para 868).

In my considered opinion the words 'from that date' are not doubtful nor ambiguous. This is because the word 'that' which appears in between the word 'from' and the word 'date' is given, inter alia, the following meaning by *The Concise Oxford Dictionary* (9th Ed) at p 1444:

(1) designating the person or thing indicated, named, understood, etc (look at that dog; what was that noise?)

It would follow, therefore, that when the legislature enacted the two concluding words of s 144(3) of the Act, ie 'that date', it must be taken to have intended the cumulative effect of the two words to mean something which is indicated, named and understood, to wit, 'the date of the deposit of the requisition'. These words are found in s 144(3) of the Act and also in s 144(1) of the Act. In my judgment, if the legislature had intended to give a different meaning to the concluding word 'date' in s 144(3) of the Act, it would not have used the preceding word 'that' to describe or refer to the word 'date'.

A The court's view is fortified by the legislature's choice of the concluding words in s 144(1) of the Act, to wit, 'but in any case not later than two months after the receipt by the company of the requisition' which clearly differ from those in s 144(3) of the Act, to wit 'but any meeting so convened shall not be held after the expiration of three months from that date'.

B The distinction is warranted because under s 144(1) of the Act it is the directors who convene the EGM and it is only reasonable and logical that time should only run from the date the company receives the requisition deposited by the requisitionists, whereas under s 144(3) of the Act, it is the requisitionists who convene the meeting and therefore, it is only reasonable C and logical that time should run from the date they deposit the requisition which date is a fact within their special knowledge.

The construction adopted by the court is also fortified by the following excerpt taken from *Halsbury's Law of England* (4th Ed) Vol 7(1), at p 496:

D

> 698 Requisition for meeting.
>
> ...
>
> If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one-half of the total voting rights of all of E them, may themselves convene a meeting. The notice convening the meeting need not state the statutory authority under which it is convened, nor is it necessary for the notice to be signed by all the requisitionists provided documents accompanying the notice clearly indicate that the meeting is in fact being called by all of them; *but any meeting so convened must not be held after the expiration of three months from the date of deposit of* F *the requisition.* (Emphasis added.)

The section in the English Companies Act 1985 which is equivalent to s 144(3) of the Act is s 368(4). The subsection provides as follows:

> If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of G them representing more than one half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of three months from that date.

Even assuming for a moment that the court is in agreement with Mr Loh Siew Cheang that the words 'from that date' are doubtful or ambiguous in H their meaning, the opinion expressed in legal textbooks by authors of established reputation may be considered not as authority on the construction but as evidence of the construction which has been generally accepted in the legal profession (eg Sir Edward Coke, see *Strother v Hutchinson* (1837) 4 Bing NC 83 at p 89; *Newcastle Corpn v A-G* (1845) 12 Cl & F 402 at p 419; *Gorham v Exeter (Bp), Ex p Exeter (Bp)* (1850) 10 CB I 102, 138 ER 41; *Willmott v London Road Car Co Ltd* [1910] 2 Ch 525. As to other authors, see *R v Ritson* (1869) LR 1 CCR 200 at p 203; *Re Warner's Settled Estates, Warner to Steel* (1881) 17 Ch D 711 at p 713; *Bastin v Davies*

[1950] 2 KB 579 at p 581; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at p 59 and 72; per Lord Denning MR and Roskill LJ and *Basset v Basset* (1744) 3 Atk 203 at p 208; *Alexander v Kirkpatrick* (1874) LR 2 Sc&Div 397 at p 400; *Henty v Wrey* (1882) 21 Ch D 332 at p 348; *Bromley & Ors v Tryon & Ors* [1952] AC 265 at pp 274–275; see *Halsbury's Law of England* (4th Ed) Vol 44, para 844). A

As stated earlier, there is a distinction between the time prescribed in s 144(1) and that in s 144(3) of the Act for the holding of the EGM. B

Where the directors themselves convene the EGM, the EGM must be held within two months from the date of the receipt of the requisition. However, where the requisitionists or any of them representing more than one-half of the total voting rights of all of them convenes the EGM, the EGM must be held within three months from the date of the deposit of the requisition. This means that when the requisitionists or any of them who qualifies to do so convenes the EGM, they or he is given another month to do so in order to take into account the period of 21 days which is given to the directors to convene the EGM. It is only after the expiration of the 21 days without the directors convening the EGM that the shareholders or members concerned can themselves proceed to convene the EGM. C D

In the instant case, since the requisition was received by the first plaintiff on 22 April 2002, the EGM should have been convened and held at the latest on 22 June 2002 by the directors. However, since the directors of the first plaintiff did not, between 22 April 2002 and 13 May 2002, issue any notice calling for an EGM then pursuant to s 144(3) of the Act starting from 14 May 2002, onwards the defendant is entitled to issue a notice calling for an EGM which should have been held at the latest on 22 July 2002. E

The court is satisfied in the light of para 11 of the defendant's affidavit in reply (encl 4) that the defendant had taken immediate steps towards the convening of the EGM through its solicitors in that on 14 May 2002 the defendant's solicitors requested vide a letter dated the same date (exh 4) the company secretary of the first plaintiff to confirm if any steps had been taken to convene the EGM. But there was no reply from the first plaintiff. F

The defendant's solicitors also sent a letter dated the same date (exh 5) to the share registrars of the first plaintiff, namely, Malaysian Share Registration Services Sdn Bhd ('MSRSBB') requesting a list of the shareholders of the first plaintiff. G

The response from MSRSBB (exh 6) although prompt being made the very next day, ie 15 February 2002, was unfortunately of no assistance to the defendant because it informed the defendant that it was unable to comply with the defendant's request and that the defendant had to obtain the prior approval of the first plaintiff before the defendant's request could be acceded to. H

A week later, ie on 22 May 2002, the defendant's solicitors again wrote to MSRSSB (exh '7') to be furnished with a copy of the share register of the first plaintiff, pursuant to s 160 of the Act. I

This time around the response from MSRSSB was not so prompt because it only came a good seven days later, ie on 29 May 2002. Although it appeared to be a more positive response because it indicated to the defendant that the directors of the first plaintiff would be complying with the defendant's request pursuant to s 160 of the Act, subsequent events showed otherwise. This was because on the following day, ie on 30 May 2002, MSRSSB wrote to the defendant's solicitors (exh 8) informing them that they had not received any instructions from the first plaintiff.

On 30 May 2002, the defendant issued a letter to MSRSSB putting them on notice of their statutory obligations pursuant to s 160(3) of the Act. MSRSSB then issued a letter dated 31 May 2002 to one Tung Soo Aik, a director of the first plaintiff to notify the first plaintiff of its obligation under s 160(3) of the Act. The first plaintiff responded on 4 June 2002, instructing MSRSSB to withhold the release of the company's shareholders' list pending their board meeting and confirming that 'we will be wholly responsible for consequences thereof'. On 7 June 2002 the defendant's solicitors put on record the first plaintiff's non-compliance of the 21 days allowed under s 160(3) of the Act, to furnish the shareholders' list upon request and issued a final notice for compliance, failing which complaints would be made to the relevant authorities.

The letters dated 30 May 2002, 31 May 2002, 4 June 2002 and 7 June 2002 are exhibited, collectively, as exh 9.

It is significant that MSRSSB did not state in any of their letters to the defendant that it had received a letter from the first plaintiff allegedly sent by the first plaintiff to MSRSSB informing MSRSSB that the first plaintiff had no objection to the defendant's request for a copy of the shareholders' list provided the defendant pay a sum of RM3,000 in advance in accordance with s 160(3) of the Act. Since the first plaintiff has not exhibited any proof of posting of the letter (exh THC-1, encl 5) the court is satisfied that the letter was never sent to MSRSSB and that the first plaintiff's assertion being a bare assertion should be rejected.

Notwithstanding the obstructive and delaying tactics of the plaintiffs, the defendant managed subsequently to obtain a copy of the first plaintiff's shareholders' list and took immediate steps to convene an EGM. On 9 July 2002, the defendant issued a circular to the shareholders ('the said circular') and notice of the EGM to be held by the defendant at Sri Mas 2 & 3, The City Bayview Hotel, 25-A, Farquhar Street, 10200 Penang on Wednesday, 7 August 2002 at 2.30pm to consider and vote on the proposed removals and proposed appointments. The said circular was approved by the Kuala Lumpur Stock Exchange before the same was issued. The Securities Commission was also duly notified and served with a copy of the said circular and notice of the EGM. The auditors of the first plaintiff were also duly notified and served with a copy of the said circular and notice of the EGM. The said circular together with the notice of EGM are exhibited, collectively as exh 10.

In fixing the aforesaid date of the EGM, the defendant had to take into account the period of 28 days statutorily required for special notices under

the Act. On 9 July 2002 the defendant's solicitors re-sent (exh 11) the requisition for an EGM together with special notice of intended resolutions to remove directors of the company dated 11 April 2002, on all of the directors in order to comply with s 128(2) of the Act, in the event the first plaintiff had failed to do so.

Had a copy of the company's shareholders' list been supplied to the defendant on 15 May 2002 or at the very latest within 7 days from 14 May 2002, ie before 22 May 2002, the defendant would have had two months which would have been sufficient time to convene the meeting on or before 22 July 2002.

The court is in agreement with Dato' Mahinder Singh Dulku that in view of the words 'shall not be held' in the concluding phrase of s 144(3) of the Act, ie 'but any meeting so convened shall not be held after the expiration of three months from that date', the negative provision is a mandatory one and not merely a directory one. Consequently, the court cannot allow the defendant's solicitors' notice dated 9 July 2002 convening the meeting to be held on 7 August 2002 to remain operative since 7 August 2002 was clearly outside the three month period provided and intended by the legislature when enacting s 144(3) of the Act.

The reason is because where a statute requires an act to be done within a particular time, the question arises whether the validity of the act is affected in a failure to comply with what is prescribed.

The following excerpt taken from *Halsbury's Laws of England* (4th Ed) Vol 44, para 933 is relevant:

> 933 *Mandatory and directory enactments.*
>
> ...
>
> If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as 'mandatory', 'absolute', 'imperative' or 'obligatory'; if, on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be 'directory'.
>
> No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relating to the general object to be secured. Thus it is not possible to generalize by reference to the nature of what is prescribed. *No great reliance can be placed either on the suggestion that provisions framed purely in affirmative language are normally construed as directory, although the converse proposition, that negative provisions are prima facie mandatory, would seem on principle to be less open to criticism.* (Emphasis added.)

In the case of *Dato' Hamzah Abdul Majid & Anor v Wembley Industries Holdings Bhd* [1998] MLJU 443 (also at [1998] 4 CLJ 471) at pp 6–7, onwards Abdul Aziz J (as His Lordship then was) observed as follows in respect of the effect of s 144(3) of the Act:

A The position is different under sub-s (3). There, it is expressly stated that a meeting convened by the requisitionists themselves 'shall not be held after the expiration of three months' from the date the requisition is deposited. *The sub-section forbids the holding of the meeting itself after the three months.* I am able to discern a rationale for that. As I said, sub-s (3) gives the requisitionists the right of self-help, and, as stated in *Re Ariadne Australia Ltd* 2 ACLR 791, at p B 794, it is 'to cloak the requisitionists with the power to act in place of the directors where the directors are refusing to call a meeting of shareholders which they are obliged to call'. The rationale has to do with the maintenance of good order in a company. If the right of the requisitionists to themselves convene a meeting is viewed as a legally-sanctioned usurpation of the role of the established power, namely the directors, in order to achieve what the C requisitionists themselves want, it is understandably desirable that, the power now being in their hands to achieve it, they must not dally in achieving it. The state of usurpation must not be allowed to go on for longer than is necessary. *Thus the meeting that they convene must not be allowed to be held after the three months.* (Emphasis added.)

The court also agrees with Dato' Mahinder Singh Dulku that before the D court can exercise the discretion conferred upon it by s 355(4) of the Act to enlarge the time for the holding of the EGM outside the three month period stipulated in s 144(3) of the Act, there must be a proper application before the court and that the defendant cannot apply for enlargement of time simply by way of an oral application and a statement in para 28 of its affidavit in reply at encl 4 to oppose the plaintiffs' application.

E In my judgment, although the court agrees with Mr Loh Siew Cheang following the case of *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10 at p 33 that s 355(3) of the Act empowers the court to make a validation order in respect of proceedings at company meetings provided no injustice is done to the company or to any member or creditors thereof the F court has no judicial discretion to validate the notice convening the meeting because the validation that is really required is essentially of the EGM to be held on 7 August 2002 because the event, ie the EGM has not taken place yet. It follows, therefore, that s 355(3) of the Act is inapplicable because there is nothing at this stage of the proceedings for the court to validate since the EGM being a future event has yet to be held at the time of the hearing G of the application (see the Supreme Court case of *See Nyuk Fung & Ors v PanGlobal Equities Bhd*).

Consequently, the court declared the notice to be null and void and of no effect, granted an interim injunction to restrain the defendant from holding the EGM on 7 August 2002 until the final determination of the H proceedings or until further order of the court, ordered the defendant to bear the costs of the proceedings and for damages to be assessed by the senior assistant registrar and paid to the plaintiffs by the defendant.

Nevertheless, in view of the obstructive and delaying acts of the defaulting directors, the court gave liberty to the defendant to apply I formally for enlargement of time by ruling that there was nothing to stop the defendant from making a proper application for enlargement of time if it so chooses to do so subsequently and that the interlocutory

injunction granted by the court will remain effective until further order of the court.

Order accordingly.

Reported by Peter Ling